Filed 1/27/20 P. v. Powell CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ADAM CLAYTON POWELL, Defendant and Appellant.	A154516 (Solano County Super. Ct. No. VCR227984)

Adam Clayton Powell (defendant) appeals from a judgment entered after he was convicted of—and sentenced to a total prison term of 13 years, 4 months for—child endangerment (Pen. Code, § 273a, subd. (a)),[1] possession of a firearm by a felon (§ 29800, subd. (a)(1)), possession of an assault weapon (§ 30605, subd. (a)), possession of body armor by a felon (§ 31360, subd. (a)), "large-capacity magazine activity" (§ 32310), and possession of a short-barreled rifle or short-barreled shotgun (§ 33210). He contends: (1) his conviction for "large-capacity magazine activity" must be reversed; (2) his sentence on all but one of the "firearm related offenses" should have been stayed under section 654; and (3) he is entitled to custody credit for the 22 days he spent in the hospital after his arrest and before he was transferred to county jail. We reverse his conviction for large-capacity magazine activity and affirm the judgment in all other respects.

[1]All further undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

On February 5, 2018, an amended information was filed charging defendant with two counts of attempted murder of peace officers (§§ 664/187, subd. (a); counts 1 & 2), child endangerment (§ 273a, subd. (a); count 3), possession of a firearm—"RIFLE/HANDGUN"—by a felon (§ 29800, subd. (a)(1); count 4), possession of an assault weapon (§ 30605, subd. (a); count 5), possession of body armor by a felon (§ 31360, subd. (a); count 6), buying or receiving a large-capacity magazine (§ 32310; count 7), and possession of a short-barreled rifle or short-barreled shotgun (§ 33210; count 8). The information alleged defendant personally used a rifle in the commission of the attempted murders (§ 12022.53, subd. (b)), willfully caused harm or injury to a child (§ 12022.95)[2], and had suffered two prior serious or violent felony convictions (§§ 1170.12, subds. (a)-(d), 667, subds. (a)(1), (b)-(i)).

On October 16, 2016, defendant left his house for about an hour; upon his return, he went upstairs to use the master bathroom. Defendant's two-year-old son A. followed him. About five minutes later, R.W.—defendant's girlfriend and the mother of A.—also went upstairs; she saw defendant on the toilet and A. sitting on the bed. As R.W. was about to sit down on a chair next to the bed, she heard a "pop" and looked over to A., whose eyes rolled back before he fell back onto the bed, bleeding. R.W. began to scream "hysterically" and defendant "ran straight over" to A. and began applying pressure to A.'s neck. R.W. ran downstairs screaming to her parents for help. R.W.'s father dashed upstairs, and he and defendant tried to stem the blood coming from A.'s neck while R.W. called 911. Paramedics arrived almost immediately. Defendant was "distraught" and looked as if he was "just not there [any] more" and "had lost it"; he left the house. A. was transported to the hospital in "grave condition" and underwent life-saving

[2]The trial court dismissed this allegation at the prosecutor's request.

procedures and surgery for a gunshot wound to his neck. He was sent to a rehabilitation center where he stayed for numerous weeks.

At approximately 8:00 or 8:30 p.m. the evening of October 16, two uniformed Vallejo police officers were drinking coffee inside a Starbucks coffee shop when defendant approached, stood outside the glass doors, looked at the officers, and pointed an assault rifle with an attached large-capacity drum magazine in the officers' direction. Defendant appeared to be trying to chamber a round in the rifle. The officers jumped up and drew their service weapons as defendant walked "briskly" away. The officers went outside and ordered defendant to stop. Defendant rushed towards a residential neighborhood and officers gave chase. When defendant refused to stop or comply with verbal commands, the officers fired multiple rounds at him, hitting him and causing him to fall into a ditch. Defendant was subsequently arrested and paramedics arrived. The rifle with drum magazine, a loaded Beretta semi-automatic handgun, and body armor defendant was wearing were collected from the scene. Defendant's truck was found parked nearby with a rifle case draped over the back seat.

A Vallejo police officer testified that the barrel of a rifle must be at least 16 inches long and the rifle's overall length must be at least 24 inches for it to be "legal to possess." The barrel of the rifle defendant was carrying measured just under 10 inches in length and its overall length was about 23.5 inches. The drum magazine attached to defendant's rifle contained 50 live rounds. Defendant's rifle had a malfunction; an expended cartridge was jammed in the ejection port, and duct tape wrapped around the handle prevented the bolt from being pulled back far enough to clear it. Defendant's handgun was functional and was loaded with a magazine attached and a round chambered.

Defendant took the stand and admitted he was a convicted felon. On October 16, he left his house, armed with a handgun and wearing a bullet-proof vest, to sell some marijuana to a buyer at a cannabis club. When he returned home, he rushed upstairs to use the master bathroom, unaware that his son had followed him. He tossed his jacket,

which contained his handgun, on the master bed. While in the bathroom, he heard a pop and saw R.W. moving towards A., who began to bleed. Defendant tried to stop the bleeding; R.W.'s father rushed in and also applied pressure to A.'s neck. Defendant believed A. was dying. He asked R.W.'s father to take care of A., then grabbed his jacket and the handgun. He thought about shooting himself "[r]ight there on the spot" but thought he had "already done enough" and decided to leave the house and "take it elsewhere." He stopped at the homes of relatives and friends, telling them that A. had died; he made amends and said goodbye.[3]

Defendant bought two water hoses and duct tape from Home Depot, thinking he could commit suicide by carbon monoxide. He decided against "do[ing] it by my own hand" because he wanted the chance to go to heaven to see A. again. As he was trying to decide what to do, defendant saw police officers at Starbucks and thought about getting " 'gunned down' " by the officers. Defendant had an AR-15 rifle with him, which he had received from a friend who "makes" them. The friend said he wanted to sell the rifle at a low price because he needed money; he later added a drum magazine to the deal. After testing the rifle and realizing it did not function properly, defendant decided to loan the friend the money and keep the rifle as collateral. He stored the rifle in his truck.

Defendant parked his truck, took the rifle and handgun, walked up to Starbucks, and waved the rifle around to get the officers' attention. He used the rifle that did not work because he knew the handgun worked and he did not want to risk firing back "just out of reflex." When the officers got up, defendant walked away; he was surprised they did not shoot him right away. As the officers followed, defendant decided to "light[ly]" "trot" away with his back to the officers so that he would not have to see himself get shot. The officers shot him several times, and defendant was in a coma for three weeks.

---

[3]Defendant's family and friends testified that defendant called or visited them on October 16 to tell them A. had died, and to make amends or say goodbye. The witnesses also testified generally about defendant's good character.

A Vallejo police officer testified that he responded to the scene and saw defendant on his back in a ditch. The officer began rendering first aid after realizing defendant was severely injured with gunshot wounds to his neck, buttocks, and cheek. The officer got on an ambulance with defendant to "try to obtain a dying declaration." On their way to the hospital, defendant said he deserved to die and that his son had died that day. The officer, who had heard about a child who was shot earlier in the day, realized defendant was that child's father. He asked defendant whether he pointed the rifle at officers because of the pain of what had happened earlier in the day; defendant nodded yes.

A jury found defendant guilty of the four possession charges (counts 4, 5, 6, and 8) and of "large capacity magazine activity" (count 7) and acquitted him of both attempted murder counts (counts 1 and 2). The jury could not reach a unanimous verdict on child endangerment (count 3) but defendant later pleaded no contest to that count and admitted two prior strike convictions in exchange for a negotiated sentence of four years, doubled to eight years (§ 667, subd. (e)(1)) on that count. The trial court sentenced defendant to a total of 13 years, 4 month in prison, consisting of the eight years for child endangerment (count 3) plus four consecutive 16-month sentences (one-third of the middle term, doubled) on counts 4, 5, 6, and 7. The court stayed a sentence on count 8 under section 654 and awarded defendant a total of 1,128 days of custody credit. The court imposed a $10,000 restitution order and imposed and stayed a $10,000 revocation fee.

DISCUSSION

1. Large-Capacity Magazine Activity

For the reasons detailed below, we conclude defendant was not properly convicted of buying or receiving a large-capacity magazine as the jury was instructed on—and convicted him of—"possession" of a large capacity magazine, which was not a crime on October 16, 2016. The Attorney General (respondent) argues that although the instruction contained "poor wording" by referring to the charge and the elements of the offense as "possession" (which was not a crime) instead of "receipt" (which was a

crime), "any error in the wording of the jury instruction was harmless." Respondent's argument is unavailing.

The Deadly Weapons Recodification Act of 2010 (Act) repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005, 16010.) Effective January 1, 2012, former section 12020 was recodified at section 32310: "[A]ny person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, or lends, any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or in the state prison." (Stats. 2010, c. 711 (S.B. 1080), § 6.) Effective January 1, 2014, Section 32310 was amended to provide that a person who "buys" or "receives" a large-capacity magazine is also guilty of a crime. (Stats. 2013, c. 728 (A.B. 48).) In 2016, section 32310 was further amended to provide that "*commencing July 1, 2017*, any person in this state who *possesses* any large-capacity magazine, regardless of the date the magazine was acquired, is guilty of an infraction punishable by a fine. . . ." (Stats. 2016, c. 58 (S.B. 1446), § 1, italics added.) As emphasized—"commencing July 1, 2017"—the Legislature gave individuals who already possessed large-capacity magazines a grace period so that they would not be immediately guilty of an infraction for possession; the amended statute expressly provided that such individuals would have until July 1, 2017 to dispose of the magazine by removing it from the state, selling it to a licensed firearms dealer, destroying it, or surrendering it to a law enforcement agency for destruction. (*Ibid*.)

In November 2016, the California electorate approved Proposition 63, the "Safety for All Act," which largely mirrors S.B. 1446, except that possession is either "an infraction punishable by a fine" (as it was under S.B. 1446) or a misdemeanor. (Initiative Measure (Prop. 63, § 6.1, approved Nov. 8, 2016, eff. Nov. 9, 2016).) This version of section 32310—which is also the current version of the statute—became effective November 9, 2016 and also gives individuals who possess large-capacity

magazines until July 1, 2017 to dispose of them. (§ 32310, subd. (d).) Thus, as of October 16, 2016—the date of the offenses in this case—it was a crime to have bought or received a large-capacity magazine on or after January 1, 2014 (the effective date that buying or receiving was criminalized), but possession was not even an infraction.[4]

Here, the amended information charged defendant as to count 7 as follows: "On or about October 16, 2016, defendant ADAM CLAYTON POWELL did commit a felony namely: LARGE CAPACITY MAGAZINE ACTIVITY, a violation of Section 32310 of the Penal Code of the State of California, County of Solano, in that said defendant did unlawfully buy or receive a large-capacity magazine." At the beginning of the jury trial, when the trial court informed the jury of all of the charges against defendant, it stated as to count 7: "Count 7 alleges unlawful *possession* of a large-capacity magazine. That's something that goes into a weapon." (Italics added.) After the parties presented their evidence, and in its oral instructions to the jury, the court stated: "The following crimes require general criminal intent . . . Count 7, possession of a large-capacity magazine." The court continued: "The defendant is charged in Count 7, possessing a large-capacity magazine. To prove the defendant is guilty of Count 7, possessing a large-capacity magazine, the People must prove that: One, the defendant possessed a large-capacity magazine. Two, the defendant knew he possessed a large-capacity magazine. A large-

[4]We note that a federal district court issued a preliminary injunction on June 29, 2017 enjoining the Attorney General from implementing or enforcing the portion of section 32310 that criminalizes possession. (*Duncan v. Becerra* (S.D. Cal. 2017) 265 F.Supp.3d 1106, 1139–1140.) Defendant was charged by information dated February 5, 2018, when that preliminary injunction was in effect. On March 29, 2019, the district court held that section 32310 is "unconstitutional in its entirety" and issued a permanent injunction enjoining the Attorney General from enforcing it. (*Duncan v. Becerra* (S.D. Cal. 2019) 366 F.Supp.3d 1131, 1186.) The Attorney General has appealed that decision. In light of our decision reversing defendant's conviction on this count, we need not, and therefore will not, address the constitutionality of the statute.

capacity magazine means any ammunition-feeding device with the capacity to accept more than ten rounds."

The written instruction given to the jury provided: "POSSESSING A LARGE CAPACITY MAGAZINE [¶] To prove the Defendant is guilty of Count Seven, possessing a large capacity magazine, the People must prove that: [¶] 1. The defendant possessed a large capacity magazine; [¶] 2. The defendant knew he possessed a large capacity magazine. [¶] A large capacity magazine means any ammunition-feeding device with the capacity to accept more than 10 rounds." The verdict form for count 7 provided: "We, the Jury, concerning the charge set forth in the Information accusing the Defendant of the crime of felony violation of Penal Code section 32310, LARGE CAPACITY MAGAZINE ACTIVITY, upon trial, find the Defendant (check the appropriate one of the following): [¶] [ ] GUILTY [ ] NOT GUILTY."

Accordingly, the jury was not only informed and instructed that defendant was being charged with "POSSESSING A LARGE CAPACITY MAGAZINE," but it was also instructed by the trial court both orally and in writing that the elements of the crime were *possession* and *knowledge of possession*. The replacement of the words "buying or receiving" with "possessing" was not, as respondent argues, a simple issue of "poor wording." Rather, it turned the charged offense, which was a crime, into something that was not charged, and was not a crime. Respondent suggests the jury likely understood it was supposed to determine guilt on "buying or receiving" rather than "possessing" because the verdict form referred to "large capacity magazine *activity*." (Italics added.) The verdict form and the court, however, did not define the word "activity." Thus, there was no way for the jury to know that "activity" meant buying or receiving. We conclude the court's statements and its oral and written jury instructions resulted in the jury returning a guilty verdict for possession of a large-capacity magazine, which was not a crime on October 16, 2016.

Respondent argues the error is not reversible per se, but is subject to harmless error analysis. Respondent relies on *People v. Flood* (1998) 18 Cal.4th 470, 505, in which our Supreme Court held that the trial court's error in failing to instruct the jury on one element of the charged offense was not reversible per se. Specifically, the trial court had failed to instruct the jury that in order to find the defendant guilty of evading peace officers, the prosecution had to prove that the individuals the defendant evaded were actually peace officers. (*Ibid*.) The Supreme Court held the error was harmless beyond a reasonable doubt because there was no question in the case that the individuals the defendant evaded were peace officers. (*Ibid*.)

Defendant counters that the error that occurred in this case is reversible per se because the jury was never instructed on the charged offense and had no occasion to determine whether *any* of the elements of the offense had been proved beyond a reasonable doubt. He argues he was therefore deprived of his right to a jury trial as to count 7. We agree with defendant.

" 'The critical inquiry' " in deciding whether an error is reversible per se or whether the harmless error analysis applies " 'is not the *number* of omitted elements but the *nature* of the issues removed from the jury's consideration.' " (*People v. Merritt* (2017) 2 Cal.5th 819, 828.) "Certainly, the more elements that are omitted, the less likely it is that the error is harmless, but so long as the error does not vitiate *all* of the jury's findings, it is amenable to harmless error analysis." (*Id.* at p. 829.) Here, the error did in fact vitiate all of the jury's findings. This is not a case in which the trial court failed to instruct on a peripheral issue, or on an element of a charged offense. Rather, the court did not instruct the jury on *any* of the elements of the charged offense, and instead instructed the jury on a different act that had not been criminalized. Thus, the jury was never asked to—and did not—make any findings as to the charged offense, i.e., whether defendant bought or received a large-capacity magazine (on or after January 1, 2014).

Defendant was deprived of his right to a jury trial on count 7, and his conviction on that count must be reversed.

2. Sentencing – "Firearm Related Offenses"

Defendant contends his sentence on all but one of the "firearm related offenses" should have been stayed under section 654. Specifically, he argues that while the trial court properly stayed the sentence on possession of a short-barreled rifle (count 8), it erred in imposing consecutive sentences for possession of a firearm—"RIFLE/HANDGUN"—by a felon (count 4), possession of the rifle as an assault weapon (count 5), and large-capacity magazine activity (count 7). Preliminarily, we note that in light of our decision above reversing defendant's conviction on count 7, we limit our review to whether the trial court should have stayed all but one of the remaining "firearm related offenses"—counts 4, 5, and 8. We conclude there was no error.

Section 654 subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omissions be punished under more than one provision." Possession of the same firearm may therefore not be punished under more than one provision. (*People v. Jones* (2012) 54 Cal.4th 350, 354.) Section 654, however, does not bar multiple punishment for possession by a felon of different firearms; "a felon who possesses several firearms is more culpable than one who possesses a single weapon." (*People v. Correa* (2012) 54 Cal.4th 331, 334, 342.) " ' "[T]he purpose of section 654 'is to insure that a defendant's punishment will be commensurate with his culpability.' " ' [Citation.]" (*People v. Carter* (2019) 34 Cal.App.5th 831, 841.)

Here, respondent acknowledges that possession of the rifle as an assault weapon (count 5) and possession of a short-barreled rifle (count 8) were charged as alternate counts and that multiple punishment for possession of the same weapon—the rifle—was precluded by section 654. Respondent argues, however, that because the prosecution

alleged possession of a firearm by a felon (count 4) as possession of *either the rifle or the handgun*, and there was ample evidence to support possession of both weapons, the trial court properly imposed a consecutive sentence for count 4 to the extent it alleged the possession of a handgun. Defendant counters that because count 4 was alleged as possession of either the rifle or the handgun, and the jury was not instructed it had to "unanimously agree on either one or the other," his conviction on that count could have been based solely on his possession of the rifle—the same weapon he was sentenced for possessing in counts 5 and 8.

A trial court is authorized to "consider all of the evidence presented at trial to make its sentencing decision under section 654" where the prosecution proceeds on an alternate theory at trial. (*People v. Carter*, *supra*, 34 Cal.App.5th at p. 843.) Noting that "the applicability of section 654 is factual question for the judge, not the jury," the Court of Appeal held that "[j]ust as 'inconsistent verdicts are allowed to stand if the verdicts are otherwise supported by substantial evidence' [citation], the trial court's determination [under section 654] should be allowed to stand" if the evidence presented at trial supports the court's determination. (*Id.* at pp. 843, 844, citing e.g., *People v. Centers* (1999) 73 Cal.App.4th 84, 100–101 [for purposes of applying section 654, trial court could properly make factual finding that there were multiple victims where neither the information nor the verdicts specified a particular victim of the burglary].)

Here, there was overwhelming evidence—and it was essentially undisputed—that defendant possessed both the rifle and the handgun at various times throughout the day on October 16, 2016. Evidence was presented that defendant's son was injured by the handgun defendant placed on the bed and that defendant pointed the rifle at officers. Defendant admitted during his testimony that he possessed the rifle and the handgun. In closing argument, his counsel stated: ". . . Did he have a gun? Of course. Did he have different guns? Yes, he did. Did he have a rifle? Yes. Did he have a vest? Yes. Right? Yes. I'm not going to address any of those counts. Of course he did." Finally, when

officers arrested defendant, they found both the rifle and the handgun on his person. Under these circumstances, the trial court could properly determine the jury must have believed beyond a reasonable doubt that defendant possessed both weapons and that multiple punishment was appropriate. We conclude the court did not err in sentencing defendant for being a felon in possession of the handgun (and rifle) in count 4 and for possession of the rifle in counts 5 and 8.

3. Custody Credit During Hospitalization

At sentencing, the trial court awarded defendant a total of 1,128 days of custody credit, comprised of 564 days of actual custody credit and 564 days of conduct credit. The court calculated custody credit beginning on November 7, 2016, when defendant was transferred from the hospital to county jail. Defendant contends he is entitled to custody credit for the 22 days he spent in the hospital after his arrest and before he was transferred to county jail. We disagree.

Defendant relies on section 2900.5 subdivision (a), which provides: "[W]hen the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, *hospital*, prison, juvenile detention facility, or similar residential institution, all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment. . . ." (Italics added.) Courts have held that a defendant who is "involuntarily confined" at a mental hospital is entitled to credit for time spent in the hospital because the confinement serves all of the permissible purposes of punishment, namely, "to discourage and act as a deterrent upon future criminal activity," "to confine the offender so that he may not harm society," and "to correct and rehabilitate the offender." (*E.g., People v. Cowsar* (1974) 40 Cal.App.3d 578, 580–581.)

The statute's " ' "dual legislative purpose[s]" ' " are to eliminate unequal treatment suffered by indigent defendants who serve longer overall confinement because of their inability to post bond, and to equalize the actual time served in custody. (*People*

v. Ravaux (2006) 142 Cal.App.4th 914, 920 (*Ravaux*).) Whether a defendant is in "custody" for purposes of section 2900.5 is a matter of statutory interpretation. (*Id.* at p. 919.) Looking at the plain language of the statute, the Court of Appeal in *Ravaux* held that "custody" begins at the time a defendant is booked into custody. (*Id*. at pp. 919–921.)

"The crucial element of the statute is not where or under what conditions the defendant has been deprived of his liberty but rather whether the custody to which he has been subjected 'is attributable to charges arising from the same criminal act or acts for which the defendant has been convicted.' " (*In re Watson* (1977) 19 Cal.3d 646, 651; § 2900.5, subd. (b).) Thus, a defendant "is not entitled to credit for presentence confinement unless he shows that the conduct [that] led to his conviction was the sole reason for his loss of liberty during the presentence period." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191; *People v. Mendez* (2007) 151 Cal.App.4th 861, 865 [not entitled to credit for time spent at a state hospital where the defendant was there on a civil insanity commitment and would have been there irrespective of confinement on the criminal charge].)

Here, the trial court properly calculated defendant's actual custody credit. Defendant had not been booked on any charges while at the hospital. His hospital stay was also not solely attributable to charges arising from his conduct; rather, he was there for treatment of his wounds, which was necessary regardless of any criminal charges. Moreover, his time at the hospital did not serve the purposes of punishment—e.g., "to correct and rehabilitate the offender"—as the mental hospital did for the defendant in *People v. Cowsar*, *supra*, 40 Cal.App.3d at pages 580–581. Defendant argues it was as if he were in custody at the hospital because he was guarded, restrained, and not allowed any visitors. However, he provides no record citations for his factual assertions and there is nothing in the record that supports his characterization of his hospitalization.

Defendant also argues that to deny credit to individuals who require medical attention at the time of arrest arbitrarily discriminates against them in violation of the Equal Protection Clause. The Equal Protection Clause prohibits a state or other governmental actor from adopting a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836.) Here, the two groups that are being treated differently are not similarly situated; an arrestee who is in a hospital being treated for wounds is not in the same custodial setting as an arrestee who is booked into jail and placed in a cell. Moreover, using the date of booking for purposes of calculating presentence custody credit is rationally related to a legitimate government interest: "[T]he booking of a suspect into jail represents a bright line for trial courts to begin counting credits." (*Ravaux, supra,* 142 Cal.App.4th at p. 921 [rejecting equal protection argument].) In sum, the trial court's use of defendant's booking date, rather than his hospitalization date, to calculate custody credit did not violate equal protection principles.

DISPOSITION

Defendant's conviction for count 7, "large-capacity magazine activity," is reversed. The judgment is affirmed in all other respects.

_____
Petrou, J.

WE CONCUR:

_____
Fujisaki, Acting P.J.

_____
Jackson, J.

A154516/People v. Powell